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No. 681

In The

Supreme Court of the United States

OCTOBER TERM, 1939

RAILROAD COMMISSION OF TEXAS ET AL,
Petitioners

VS

ROWAN & NICHOLS OIL COMPANY,
Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO SAID HONORABLE COURT:

Since the questions and specification of errors presented by the Attorney General of Texas, the Railroad Commission of Texas and its members really involve only one issue, this answer will be directed to that issue.

ISSUE PRESENTED

The fundamental question is whether or not the Railroad Commission of Texas can, by prorating the daily East Texas field allowable among wells on prac-

tically a per well basis, restrict the daily production of oil from the lease of Rowan & Nichols Oil Company, with large oil reserves, favorable position on the structure, and wells of high potential production, to substantially the same amount of oil that other leases with small reserves, unfavorable position on the structure, and wells of very low potential are allowed to produce, and thus deprive Rowan & Nichols Oil Company of its property and bestow it upon others, when such system of proration is not necessary to conserve the natural resource, but in fact contributes to its waste.

STATEMENT

Rowan & Nichols Oil Company, Plaintiff in the trial Court, will be referred to as Plaintiff; and the Railroad Commission of Texas and others, Defendants in the trial Court, will be referred to as Defendants.

The recitation of facts made in the petition for review on writ of certiorari is not adopted, except as indicated. The statements of fact now made are based upon the findings of the trial Court.

(1) The statement by Defendants as to the nature of the East Texas field is substantially correct. This field is a common reservoir, the fluids therein migrating rather freely, with possible exception of a few small areas of no consequence with respect to the issue here involved. Pressure is readily transmitted from one point to another, and always there is an adjustment of pressures in the seeking of equilibrium. The reservoir fluids move from high pressure areas to low pressure areas, and by virtue of the pressure and movement of the water, the oil moves eastward. The

pressure of the water moves the oil eastward, and the oil is followed by the water. Although Plaintiff has as much oil in place now as ever, the water is constantly approaching, and if it is not permitted to produce its oil currently with others, this oil will pass on up-structure to the east and be forever lost to Plaintiff.

(2) While there is some lack of uniformity in porosity and permeability of the sands in some parts of the field, it may be said on the whole the Woodbine sand is fairly uniform. (R., 961) If the underground conditions of porosity and permeability are not generally uniform, certainly the present potential map of the Commission from which well allowables are calculated, reflects no lack of uniformity in these conditions, but, on the contrary, necessarily assumes a high degree of uniformity over wide areas and distances between contour lines. (R., 962) The sands are not of uniform thickness. (R., 961)

(3) Position on structure, thickness of sands and distribution of allowable all enter into ultimate recovery from any lease or area. Plaintiff's lease is ideally situated on the structure, and, under open flow conditions, would have a distinct advantage over leases both to the east and the west. (R., 977) Plaintiff's lease is in the portion of the field where the thick sand is found. (R., 976) This natural advantage can be changed, either increased or decreased, by the method of distribution of production. By the present method, avoidable drainage is not reduced to a reasonable minimum, but, on the contrary, it is aggravated to the material damage of Plaintiff. (R., 965) The migration of oil is not limited to from west to east alone, because where the drilling is dense in many

areas, these regions of concentrated withdrawals cause low pressure areas, which in turn cause the migration of oil to such areas. Although the statement in Defendants' application indicates otherwise, their own witness testified and the trial Court found that there are many areas to the west, and in fact in all directions, from Plaintiff's tract which are more densely drilled and where pressures are lower. (R., 965).

(3) The Commission, by granting exceptions to the spacing rule, departed from the idea of uniform and equitable withdrawals permitted by equal spacing where coupled with a proration order embracing appropriate factors such as true potentials, and granted numerous exceptions to the spacing rule, resulting in irregular spacing and unequal withdrawals throughout the field. (R., 966) Although one well will reasonably drain ten acres or more in said field of approximately 131,000 acres (R., 70), there are now some 26,000 wells in the field, or an average density of one well to 5.1 acres, all due to the constant exceptions granted by the Commission to the spacing rule, and in many instances, there are numerous wells on fractions of an acre. Plaintiff has a density of one well to approximately 5 acres, or a total of 5 wells on approximately 25 acres. (R., 68) Since all wells are given a minimum allowable of 20 barrels if they can make it, this permits a well to pay out in some two years, as pointed out by one of the Defendants' witnesses, and this encourages the drilling of more wells, and the operator who could get the most permits gets the most oil. (R., 540) As pointed out in the trial Court's opinion, therefore, the difficulty in which the Commission finds itself grows largely out of its relaxation of its own spacing rule, which is the equivalent of one well

to ten acres. The drilling of thousands of wells, unnecessary so far as the public interest is concerned, has required the Commission to listen to the demands of those well owners at the expense of other operators better situated. No effort has apparently been made to require those parties producing upon small and too densely drilled acreage to pool their tracts. (R., 73)

(4) The plan of distribution of allowable for the field has not for some years attempted to take into account the surface acreage in any lease or its underlying oil reserves. (R., 969) The R. M. Wood lease adjoining Plaintiff's lease has one well on one-tenth of an acre, or one acre as claimed by Defendants, and was permitted to produce substantially as much oil as any one of Plaintiff's wells drilled at a density of one well on five acres, although the underground and all other conditions were admitted to be the same, except it had to be assumed that as to each well on Plaintiff's lease, Plaintiff had fifty times as much oil as the Wood lease, assuming that lease to embrace only one-tenth of an acre. There were numerous instances all over the entire field of many wells drilled on tracts of less than one and two acres. (R., 969, 974, 976) Under the plan, Plaintiff's wells, with a daily potential of 20,000 barrels, were given only two barrels more daily, five days a week, than practically the poorest well in the field that would only produce 20 barrels a day. (R., 68, 69)

(5) A stipulation was entered into by the parties showing the effect of the plan of proration as interpreted and applied by the Commission. The substance of it was that each well in the field was given 2.2% of its hourly potential, and if the product did not amount to 20 barrels, the well was arbitrarily given

20 barrels. By this method of giving each well that would daily produce 20 barrels of oil, a minimum of 20 barrels, all of the daily allowable of 522,000 barrels was taken up but approximately 7,000 barrels, which in the practical application of the order of the Commission was the only oil allocated on the potential basis. The field allowable was therefore allocated 98½% on the per well basis. Plaintiff's share per well of this 7,000 barrels of allocable oil was approximately two barrels per day. (R., 69, 970)

(6) In August, 1937, after the Wood permit was granted and an appeal from the order granting the permit had availed Plaintiff nothing, application for an adjustment in allowable of said well to reduce it and to increase the allowable for Plaintiff's wells was sought before the Commission, and alternatively, in the event under the law it was necessary to drill additional wells, Plaintiff asked for some twenty permits to place it on an equal footing with Wood. The application for adjustment in allowable was denied, and permit for only one well was granted. (R., 978) Plaintiff already had more than sufficient wells to reasonably drain and produce the oil underneath its tract. (R., 70)

(7) The practical effect of the order is to allow Plaintiff to produce from its lease at a rate of approximately 4.5 barrels per acre per day, while Wood, on an adjoining tract, assuming it to be one-tenth of an acre, is permitted to produce 220 barrels of oil per acre per day, or if one acre, then 22 barrels per acre per day. (R., 983) Others are producing as high as 200 barrels per acre per day. (R., 975) Under the present plan of proration, on a five-day basis, it would take Plaintiff thirty-nine years to recover its oil, whereas

the rest of the field would have recovered all of the recoverable oil under it within eleven years. Others were recovering their entire reserves in one year. (R., 977) The Commission sought to justify its position under its interpretation of the marginal well law. It claimed that every well which would only pump 20 barrels or less per day must be given 20 barrels or what it would make, and thus this necessarily had to form a standard for the allocation upward to the other wells of the balance of the allowable. There were only 451 such marginal wells producing about 5500 barrels of oil per day. The trial and appellate Courts found and concluded that wells in the field could be pumped profitably at 5 barrels a day and a flowing well could be produced at that rate with more profit. (R., 989) The interpretation of the marginal well law by the Commission was frowned upon by the trial Court, since wells could be pumped profitably at substantially less than 20 barrels without causing ultimate loss of oil, injury to the well, or premature abandonment, and the Court observed that if Defendants' interpretation was correct, the scheme or the statute must fall. (R., 74, 75) From the standpoint of waste, it was found that none would occur if many of the wells in the field were actually shut in or were allowed to produce as little as 5 barrels a day. (R., 989) Any method of distribution of the field allowable which gives operators opportunity to receive their fair share of the allowable would not create as much waste as does the method of distribution under attack. (R., 991)

REASONS FOR WHICH THE WRIT SHOULD BE DENIED

Article 6049c, Vernon's Texas Civil Statutes (Chap. 76, Acts of the Forty-fourth Legislature, Regular Session), in conferring upon the Railroad Com-

mission the authority to restrict production to prevent waste, provides that:

> "In the event any such rule, regulation, or order which the Commission may adopt provides for the limitation or fixing of the production of crude petroleum oil, or of natural gas from wells producing gas only, in any pool or portion thereof, the Commission shall distribute, prorate, or otherwise apportion or *allocate the allowable production among the various producers on a reasonable basis.*" (*Italics ours*)

In Texas and in other jurisdictions following the absolute ownership view, the landowner is regarded as having title in severalty to the oil and gas in place beneath his land. (*Brown vs Humble Oil & Refining Co.*, 126 Tex. 296, 305; 83 S. W. (2d) 935, 940; 87 S. W. (2d) 1069)

In many decisions, largely involving the well spacing regulations of the Railroad Commission, the Texas Courts have frequently announced the rule that each landowner should be afforded the opportunity to produce his fair share of the recoverable oil. (*Empire Gas & Fuel Co. vs Railroad Commission*, 94 S. W. (2d) 1240, 1242 (error refused). This holding recognizes the existence of correlative rights between the various landowners.

Obviously, no order of distribution would be "reasonable" or would comply with constitutional guaranties which did not respect within reasonable limits the property rights of the operators affected by the order. An order which in effect arbitrarily takes from one operator and gives to another plainly does not provide for a distribution on a "reasonable" basis. Moreover,

it results in unwarranted confiscation. The above quoted statute denies to the Railroad Commission power to allocate the allowable production among operators on any basis except a reasonable basis, and the Constitution of the United States prohibits any attempt by either the Legislature or the Railroad Commission to allocate production among operators on any other basis.

The Commission, by the order here involved, places the East Texas field on a per well basis,—a basis of proration respectfully repudiated by the Federal Courts. The evil existing in orders previously stricken exists here. It is subject to the same criticism directed by the Court at the order involved in *Peoples Petroleum Producers, Inc., vs Smith et al*, 1 Fed. Sup. 361, 365, wherein the Court said:

> "Further, if we disregard the statutory prohibition against restricting supply to 'equal existing market demand,' we think it equally plain that plaintiffs are entitled to relief. * * * The rules have been entered and are being enforced in such fashion as to subject plaintiff's property to a confiscatory control. This control, transcending public necessity, has exerted the power granted beyond the necessities of the case. It has arbitrarily and without adequate grounds limited the total production of the field far below any amount which the evidence fairly shows the interest of the owners, consistent with public necessity, permits. In direct contravention of the statute, instead of justly and equitably distributing the reduction ordered, it has, through its per well requirement, so arbitrarily, unjustly, and in a confiscatory way distributed it, as that it will inevitably take the

oil of plaintiffs, situated as they are most favorably on the structure, to give it to others not so favorably situated."

Defendants sought to justify the per well order by the plea that eventually Plaintiff would recover its fair share of the oil, although it was not doing so at this time and had already lost several hundred thousand barrels of oil. The evidence did not support the contention. The contention was basically unsound, because Plaintiff is entitled to produce ratably with others at the present time, and it cannot be required to wait many years hence to share in the production that others not so favorably situated are sharing in now. As said by the Supreme Court of Texas in *Spann vs City of Dallas*, 111 Tex. 350, 355; 235 S. W. 513, 514:

> "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys any of these elements of property to that extent destroys the property itself."

As appropriately said by the trial Court:

> * * * "The matter of present day confiscation is certain. Respondents are not entitled to require complainant to gamble as to what will happen to its oil or its markets over a period of twenty-five or thirty years.
>
> "Furthermore, the Court is not of the opinion that the evidence bears the respondents out in the contention that the present order is the only one possible." (R., 72)

None of the elements of estoppel are present in this case. The uncontradicted testimony and the findings of the Court conclusively show that Plaintiff has ever been alert and has constantly protested to the Commission with regard to enforcement of the order without result. (R., 75) The present order is not the same order as was first applied and enforced as to Plaintiff, and during the period of years since its first application, the daily allowable has decreased and the number of wells granted to other operators in the field has increased from less than 10,000 to approximately 26,000, thus taking such an unreasonable and unfair part of the daily allowable that there was practically none left to allocate to Plaintiff and others similarly situated with wells and property of very high potential. (R., 75) (*Abie State Bank vs Bryan*, 282 U. S. 765, 776)

The testimony showed that there were other orders which the Commission could have adopted, curtailing, rather than creating, waste, and at the same time, equitably allocating the allowable not alone on the basis of reserves, but taking into consideration reserves, position on the structure, and other relevant factors. (R., 981, 974) (*Railroad Commission vs Rowan and Nichols Oil Company*, 107 Fed. (2d) 70, 73)

The trial Court did not attempt to write a proration order, but, on the contrary, admitted its lack of such authority. It observed, however, that since Plaintiff was clearly entitled to an injunction against the order, and since Plaintiff had not asked to produce its wells without restriction, that the Court would attempt to limit the injunction so as to do equity to Plaintiff, but, at the same time, not do injustice to adjoining

lease owners, and the injunction was therefore limited so as to permit Plaintiff to produce only that proportion of the daily allowable that its reserves bore to the reserves of the entire field, without prejudice, however, to the Railroad Commission "to enter a reasonable proration order and to fairly enforce it." (*Railroad Commission vs Rowan & Nichols Oil Company*, 107 Fed. (2d) 70, 73; *Newton vs Consolidated Gas Company*, 258 U. S. 165, 177) Certainly the Railroad Commission cannot complain of this action on the part of the Court because it redounds to its interest and benefit. (*City of Toledo vs Toledo Ry. & Light Co.*, 259 Fed. 450, 458; *Public Service Ry. Co. vs Board of Public Utility Commissioners*, 276 Fed. 979, 990; *Ottinger vs Consolidated Gas Co.*, 272 U. S. 576)

The burden of proof was discharged by Plaintiff when the undisputed testimony showed that the allocation of the allowable on a practically per well basis did not prevent waste, but, on the contrary, was conducive to waste, and that the effect and practical operation of the order was to take the property of Plaintiff and give it to others less favorably situated. The evidence further showed, as pointed out by the Circuit Court of Appeals, that the field would be depleted many years before Plaintiff would be given an opportunity to recover its oil. (R., 977) (*Railroad Commission vs Rowan & Nichols Oil Company*, 107 Fed. (2d) 70, 72)

By the pooling of tracts and eliminating unnecessary wells, further discrimination in the order could be eliminated. This the Commission claims it cannot do because a statute prohibits the unitizing of an entire field. However, Defendants' contention in this respect is impeached by the Commission's own orders, which have heretofore authorized such pooling, and

pooling has been suggested and upheld, respectively, by the Circuit Court of Appeals in *Magnolia Petroleum Company vs Blankenship*, 85 Fed. (2d) 553, and by a three-judge Court in *Tysco vs Railroad Commission*, 12 Fed. Supp. 195. (See Walker (University of Texas Law Professor), The Problem of the Small Tract Under Spacing Regulations, Bar Association, Texas Law Review, October, 1938, p. 157; Oil and Gas Journal, August 11, 1938)

Plaintiff would respectfully show, therefore, that there are no special or important reasons for granting a review on writ of certiorari in this case for the reasons hereinbefore stated and for the further reasons that:

(1) The decision of the Circuit Court of Appeals in this case is not only not in conflict with a decision of another Circuit Court of Appeals, but is in complete harmony with *Magnolia Petroleum Company vs Blankenship et al*, 85 Fed. (2d) 553, and all other cases on the subject.

(2) The decision in this case is not on an important question of local law probably in conflict with applicable local decisions, but is in complete harmony with and follows the settled law of Texas as announced in *Brown vs Humble Oil & Refining Company*, 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069.

(3) The issue in this case has been settled by this Court in *Champlin Refining Company vs Corporation Commission* (Okla.) 286 U. S. 210; *Ohio Refining Company vs Indiana*, 177 U. S. 190, 202.

(4) The Circuit Court of Appeals has not decided the question in a way probably in conflict with applicable decisions of this Court.

(5) The Circuit Court has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by a lower Court. (*Ottinger vs Consolidated Gas Company*, 272 U. S. 576)

Wherefore, Plaintiff prays that said petition for review on writ of certiorari be in all things denied.

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